FILED
OCT 4 1991
OFFICE OF THE CLERK

(2)

No. 91-438

In The

Supreme Court of the United States

October Term, 1991

WILLIAM A. KROLL,

Petitioner,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, AN ILLINOIS PUBLIC CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The respondent, Board of Trustees of the University of Illinois, a body corporate and politic of the State of Illinois, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 934 F.2d 904 (1991).

The respondent accepts the Jurisdictional Statement and Statement of the Case as presented by the petitioner. The statutory and constitutional provisions involved are set forth in the petition for writ of certiorari.

REASONS FOR DENYING THE PETITION

THE OPINION BELOW WAS NOT BASED ON THE APPLICABILITY OF THE ELEVENTH AMENDMENT TO A PENDING CAUSE OF ACTION FOLLOWING THE MERGER OF A CORPORATION INTO A STATE ENTITY; RATHER, THE DECISION RESTED ON A FINDING THAT THE ENABLING LEGISLATION FOR THE MERGER DID NOT CONTAIN THE REQUISITE ELEVENTH AMENDMENT WAIVER LANGUAGE.

1. The decision of the Seventh Circuit does not raise the first question presented in the petition.

This case does not present the factual scenario necessary for this Court's clear resolution of the first question presented by the petitioner. That is, whether the Eleventh Amendment is applicable to a lawsuit pending in a federal court following a merger, wherein the surviving corporation is a state agency. A necessary factual prerequisite to this Court's resolution of the question presented is a finding that the State of Illinois waived its Eleventh Amendment immunity through the legislative statute in question. The Seventh Circuit Court of Appeals correctly held that the language of the statute did **not** contain the explicit waiver language required by this Court's prior decisions. The Seventh Circuit thus did not reach the question of whether the Eleventh Amendment immunity would apply to a pending case since the merger statute was found deficient in the waiver language. Because the statute in question did not meet the Eleventh Amendment waiver test, the question presented by petitioner could be resolved only by rendering an impermissible advisory opinion. The question now put to this Court cannot be extracted from the opinion below.

2. The questions delineated do not present important questions of federal law.

This question regarding applicability of Eleventh Amendment immunity to a pending cause of action is not sufficiently important to warrant this Court's review. The facts of this case are clearly unique, and deciding the question posed by petitioner will affect few, if any, other litigants. As petitioner has set forth in his statement of the case, an action was pending in the district court against the Athletic Association. The complaint was dismissed on June 13, 1989, with leave to refile. On June 29, 1989, the General Assembly of the State of Illinois passed legislation providing for the dissolution of the Athletic Association and the merger of that entity into the Board of Trustees of the University of Illinois. The petitioner made no claim that the Board of Trustees of the University was not a state entity for purposes of Eleventh Amendment immunity. On July 18, 1989, the petitioner filed his amended complaint, again naming the Athletic Association as a defendant. The Board of Trustees, entered its appearance as the surviving entity of the then defunct Athletic Association, and filed its motion to dismiss asserting Eleventh Amendment immunity. The likelihood of a recurrence of such unique facts as this is extremely remote. Accordingly, this case is not worthy of certiorari.

The second question presented by petitioner is also fact specific, and requests this court to review language of a State of Illinois merger statute and render an opinion on whether that statute met the Eleventh Amendment immunity waiver test. Acceptance of review of this case

for this purpose would be of minimal public benefit. In a long line of decisions, this Court has set forth the standards to judge state statutory waiver language in ascertaining whether the state has waived its Eleventh Amendment immunity. This Court should not accept cases to make *de novo* reviews of such statutes to determine if the language meets the Eleventh Amendment waiver test. Such a process is more appropriately addressed by federal courts at the district and court of appeals levels.

3. The decision of the Court of Appeals is consistent with controlling decisions of this Court.

The Seventh Circuit correctly applied the existing standard of prior decisions of this Court in deciding the waiver issue. This Court has clearly enumerated the standards required of state statutory language to constitute waiver of a state's Eleventh Amendment immunity. The language of the merger statute at issue, Ill.Rev.Stat., Ch. 144, ¶28d(d)(4), did not meet the strict established requirements set forth within decisions of this Court.

The petitioner acknowledges that the waiver question is an essential issue in this case. The petitioner, however, has asserted that because the cases of this Court that were relied on dealt with prospective lawsuits, as opposed to an existing cause of action that subsequently became the liability of the state through a merger statute, a different waiver standard should be applied. The Seventh Circuit Court of Appeals followed established case law of this Court in determining that the statutory language did not meet the waiver test. Having determined

that, it was not necessary for the lower court to address whether a waiver applied to the unique situation at hand. Similarly, if this Court were to grant certiorari, the need to resolve petitioner's first question would be contingent upon a finding by the Court that the merger statute contained the requisite language to constitute waiver of the state's Eleventh Amendment immunity.

In support of his position that the merger statute contained the necessary waiver language, the petitioner contends that waiver "impliedly" exists because the statute provided that "any claim existing or action or proceeding pending by or against" the Athletic Association could be "prosecuted to judgment". Such an argument, however, ignores an important aspect of this court's decision on what is required to constitute a waiver of Eleventh Amendment immunity.

This Court has clearly denoted that there are two prongs to the waiver of a state's Eleventh Amendment immunity. This inquiry encompasses not merely **whether** it may be sued, but **where** it may be sued. *Port Authority Trans-Hudson Corp. v. Feeney*, ___ U.S. ___, 110 S.Ct. 1868, 1873 (1990); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241-242 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984); *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147, 150 (1981). The Illinois statutory provision relied on by petitioner as constituting waiver only meets the test of the first prong, that is **whether** the State may be sued. The statutory language, however, is deficient as to the express language this Court requires as to **where** the state may be sued.

The statute does not contain the unequivocal indication that the state intended to consent to **federal** jurisdiction. There is no express provision allowing the state to be subjected to suit **in federal court.** The state therefore did not unmistakably and unequivocally consent to suit against it in federal court, as this Court's decisions have consistently required. *Port Authority Trans-Hudson Corp. v. Feeney*, ___ U.S. ___, 110 S.Ct. 1868, 1873 (1990); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241-242 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984); *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147, 150 (1981) While there is an obvious statutory waiver of sovereign immunity in the language of the legislation, this Court has consistently held that such a waiver cannot be automatically read to waive Eleventh Amendment immunity to such suit **in federal court.** *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 468-469 (1945); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944); *Port Authority Trans-Hudson Corp. v. Feeney*, ___ U.S. ___, 110 S.Ct. 1868, 1873 (1990); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241-242 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984); *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147, 150 (1981).

Moreover, there is a more reasonable alternative construction of the language within the statutory provision that would not involve a waiver of the Eleventh Amendment immunity. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985). Illinois law provides that tort suits against the Board of Trustees of the University of Illinois are to be pursued only in the Illinois Court of Claims.

Ill.Rev.Stat., Ch. 37, ¶439.8. The state may therefore have intended a limited waiver of its own sovereign immunity. Such a waiver does not constitute waiver of the state's Eleventh Amendment immunity. *Port Authority Trans-Hudson Corp. v. Feeney*, ___ U.S. ___, 110 S.Ct. 1868, 1873 (1990).

It is irrelevant that the state may have had notice of the pending claim of petitioner at the time the enabling legislation was passed, or that the state did not raise any objection to the claim at that time. A failure to object does not constitute waiver of Eleventh Amendment immunity. A similar argument was rejected by this Court in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).[1] Regardless of the situation and the context, this Court has consistently held that in all instances, an unequivocal indication of the state's intent to consent to federal jurisdiction is required. The asserted "implied consent" or "implied waiver" because the state had notice of the pending claim in the instant case is equivalent to a "constructive consent" argument. This Court has specifically held that "constructive consent" is not a doctrine commonly associated with the surrender of constitutional rights. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974), *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238, fn. 1 (1985).

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[1] In *Atascadero*, the Court of Appeals had held the Eleventh Amendment did not bar an action where the State had "implicitly consented to be sued" as a recipient of funds under programs established by the Rehabilitation Act. This Court rejected the reasoning that a state's consent to suit could be inferred from participation in programs funded by the Act.

The language of the Illinois statutory provision in question, Ch. 144, ¶28d(d)(4), does not meet the express waiver requirements of this Court's decisions. These standards, pronounced in this Court's unbroken line of authority involving waiver of a state's Eleventh Amendment immunity, were correctly applied by the United States Court of Appeals for the Seventh Circuit in this case.

4. Granting certiorari would necessitate consideration of an issue raised but not addressed by the Court of Appeals.

An unresolved issue presented to the Seventh Circuit Court of Appeals also serves as a basis for denial of this request for certiorari. In the Court of Appeals, the respondent asserted that the pre-merger entity, the Athletic Association of the University of Illinois, was entitled to Eleventh Amendment immunity. The basis of the respondent's position was that if this entity had the required state nexus to attain status as a state actor for purposes of the action brought pursuant to 42 U.S.C. §1983, it would also meet the same criteria for the Eleventh Amendment protection extended to the University of Illinois Board of Trustees. The Seventh Circuit, however, never reached this issue advanced by the respondent because of its resolution of the case based solely on the statutory waiver question. (Appendix to Petitioner for Writ, Exhibit A at p. 7) If this Court were to grant certiorari on the basis of the questions presented by the respondent, the need for resolution of this secondary issue, also not addressed by the Court of Appeals, would resurface.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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